**An introduction to the Competition and Markets Authority**

This element introduces the Competition and Markets Authority (**CMA**).

**Introduction**

Litigators in private practice often act for large commercial operations. Such companies could be leaders in their respective markets. Such market dominance may extend throughout the United Kingdom, Europe or even worldwide. You may therefore find that some of your client’s activities attract the attention of competition law authorities as well as the courts. Even when a client is not seeking your advice in relation to competition law, it may be part of your job to spot that it is worthy of consideration in particular circumstances.

**The CMA’s information gathering and investigation powers**

The CMA is a non-ministerial department which works to promote competition for the benefit of consumers, both within and outside the UK. It is therefore akin to a regulator, in relation to competition issues. It does not pursue every case that comes to its attention. It applies certain “Prioritisation Principles” when deciding whether to conduct an investigation and / or to take the matter forward. These principles encompass many things, including:

- the benefits that an investigation might bring to consumers;

- the strategic significance of the case; and

- the resources required to undertake the investigation.

**When the CMA will conduct an investigation**

Section 25 Competition Act 1998 (**CA**) sets out the circumstances in which the CMA can conduct an investigation. These include circumstances in which:

- there are reasonable grounds for suspecting that there is an agreement which may affect trade within the United Kingdom and has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom;

- there are reasonable grounds for suspecting that the Chapter II prohibition has been infringed; or

- there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time may have affected trade within the United Kingdom and had as its object or effect the prevention, restriction or distortion of competition within the United Kingdom.

**‘Reasonable grounds’**

As can be seen, the circumstances on the previous page all refer to “reasonable grounds”. Such grounds might arise from (for example) “tip offs” from disgruntled employees, former employees, complaints from competitors or “whistle-blowers” from within a cartel. This is a relatively low threshold for the CMA to meet.

If the CMA does decide to take a matter forward, it will move on to the “Initial Assessment Phase”, during which it will generally exercise its informal information gathering powers. This, in turn, will lead to the “Formal Investigation”. Following correspondence back and forth between those involved (and the possibility of an oral hearing), the CMA will then make its final decision. In some cases, a right of appeal then exists, with such appeal being referred to the High Court or the Competition Appeal Tribunal (**CAT**), depending on the circumstances of the case.

A flowchart summarising the key stages is set out at the end of this element.

**Duty to preserve documents**

Where a person knows or suspects that an investigation is being or is likely to be carried out by the CMA, there is a duty on them to preserve documents relevant to that investigation under s.25B CA 1998.

According to this duty, a person must not falsify, conceal, destroy or otherwise dispose of a document which the person knows or suspects is relevant to the CMA’s investigation, (or permit another person to do those things).

A failure to comply with this duty can lead to sanctions including a fine (see below).

**Information gathering powers**

If the CMA has reasonable grounds for suspecting that a party is infringing competition law, there are certain powers available to the CMA to assist with its investigation.

As you can imagine, a party under investigation is unlikely to welcome inspectors from the CMA , but there are serious consequences for failing to co-operate. It would be wise for the party to call in legal advisers to seek assistance in relation to competition law but also to monitor that the investigation does not breach any human rights or other related procedural requirements.

When conducting an investigation, the CMA can use:

(i) “informal” investigation powers; or

(ii) “formal” investigation powers; or

(iii) a combination of both.

These different powers will now be considered, in turn.

**Informal information-gathering powers**

Given the extensive powers available to the CMA, those facing an investigation are often likely to comply with informal requests for information; companies are encouraged to co-operate with their regulators. The CMA’s informal methods of gathering information include face-to-face meetings, telephone conversations and written correspondence.

The CMA’s informal powers can be used in addition to or instead of its formal powers.

**Formal requests for information**

Some cases require swift and effective action by the CMA. It is not, therefore, always appropriate for the CMA to pursue informal enquiries. Such enquiries might also be ignored. In such cases, the CMA will resort to its formal investigation powers. These powers are broad and - for the reasons set out below – pose serious issues for the undertaking(s) under investigation.

**Competition Act Powers**

Key CA powers in relation to information gathering are:

- S. 26 - Requiring production of specified documents.

- S.26A - Power to ask questions

- S. 27 - Power to enter business premises without a warrant.

- S. 28 - Power to enter and search business premises under a warrant.

- S. 28A - Power to enter and search domestic premises under a warrant.

**Power to require documents and to ask questions**

Formal requests for documents and information are made using s.26 CA and such requests must be made in writing. Requests made under s.26 CA may be served outside the UK (and can require production of any document held abroad) according to s.44B CA.

Under s.26A CA, the CMA can require any individual (not just those with a connection to the relevant firm under investigation) to attend an interview or answer questions. The CMA can use this power to carry out remote interviews (e.g. over Zoom or Teams) at an appointed time and date.

**Power to enter premises: ‘dawn raids’**

It is ss 27 and 28 of the CA which enable the CMA to launch “dawn raids”, one of its most effective tools for investigating anti-competitive practices. Dawn raids are essentially “unannounced inspections”. There is no requirement for them to happen at dawn; in fact, they often occur during business hours (although searches in support of criminal investigations, such as cartel offences, might well happen as soon as practicable regardless of the time). The CMA might also undertake surveillance in advance of any visit to ensure that relevant employees are actually in the offices when the inspection takes place.

In practice, some parties being investigated for competition law infringements may seek to destroy evidence and/or warn other participants. Any CMA inspectors can accordingly require senior representatives to remain with the inspectors during searches and can (for example) seal filing cabinets.

If the CMA has obtained a search warrant under s.28 CA, it can use such force as is reasonably necessary to enter the premises. Such force must be used against the premises, rather than individuals! With a warrant, the CMA can also actively search the premises and take possession of relevant documents for preservation purposes, or copies of such documents. The CMA can also request access to any cloud storage data and operate equipment on the premises to gain access to and copy anything stored there.

If the premises are unoccupied, the officers take reasonable steps to inform the owners about their entry into the premises. If the search is carried out when the premises are unattended, the officers must leave them secured as effectively as they found them and must leave a copy of the search warrant in a prominent place.

Where the CMA is using its power under s.27 CA to enter premises without a warrant, the CMA does not have the right to search the premises but, it can still make requests for documents (including electronic documents) and copy any documents produced. It can also ask for an “explanation” of the document. Failure to provide such information might result in serious consequences (see below).

Without a warrant, the CMA cannot force entry; when faced with a refusal, the CMA will highlight the possible criminal sanctions (as set out in s.42 of the CA) and, if necessary, apply to the court for a search warrant.

Most of the premises that are subject to a CMA search will be business premises. S28A of the CA does, however, extend the CMA’s powers to encompass domestic premises (eg homes of company employees).

Given the above, undertakings being investigated would be advised to call their solicitors (or refer the matter to in-house counsel) as soon as the CMA contacts them (whether formally or informally). When the CMA is conducting a search of premises (during a dawn raid), the CMA’s “authorised officer” will consider any request for a search to be delayed pending the receipt of legal advice. The authorised officer will only, however, permit such delay as is reasonable in the circumstances of the case. A delay is unlikely if in-house lawyers are on site. The authorised officer might also attach conditions for any such delay. They might (for example) require:

- Access to the building / particular rooms;

- Filing cabinets to be sealed; and/or

- External emails to be suspended.

Any person who intentionally obstructs an authorised officer from carrying out an inspection without a warrant might be liable to a fine. Any person who intentionally obstructs an authorised officer from carrying out an inspection with a warrant might be liable to a fine and/or imprisonment.

If a client disputes the use of the CMA’s search powers, it might (i) seek judicial review of the decision to search its premises (ii) oppose any application made under s 28 of the CA; or (iii) bring proceedings against the CMA under the Human Rights Act 1998 (to the extent that any rights under that Act have been infringed - consider, for example, Article 8 and the right to a private life).

**Objecting: Consequences of not complying with the CMA’s formal powers**

As seen above, some of the CMA’s powers entitle it to forcibly enter premises. On this basis, there might be little scope for a company or individual to refuse entry / compliance. In other cases (ie where there is no right of entry), the CMA might simply apply to the court for a search warrant and then return to the premises in question.

It should be noted that any party that refuses to comply with the CMA’s investigative powers under the CA (e.g. by obstructing the CMA’s right to enter premises, refusing requests for documents and information, refusing to answer questions, and/or failing to preserve documents) can be subject to significant financial penalties under s.40A CA. For firms, the maximum fixed fine is 1% annual worldwide turnover, with additional daily penalties of up to 5% worldwide turnover. Individuals (such as company directors) can also be fined for obstructing a CMA investigation, with fixed penalties up to £30,000 as well as additional daily penalties of £15,000.

It is also a criminal offence for individuals to obstruct the CMA’s exercise of its powers to enter premises under s.27 and s.28 CA. Under s.42 CA, a person obstructing the CMA in the use of its powers under these sections can receive a fine and, where the CMA has obtained a warrant under s.28, can be subject to imprisonment.

The use of the CMA’s formal investigation powers poses serious issues for the undertakings under investigation. These issues might be commercial and/or legal. Consider, for example:

- Loss of reputation / stigma arising from any investigation;

- Dips in share price;

- Loss of customers and public confidence;

- Potential loss of confidentiality;

- Issues of privilege; and/or

- Fines and criminal sanctions if someone intentionally obstructs any investigation.

**‘Privilege’ and CMA investigations**

Sections 30 of the CA deal with privileged communications. Section 30 applies in most cases under the CA. It states:

*“(1) A person shall not be required, under any provision of this Part, to produce or disclose a privileged communication.*

*(1A) Nothing in section 28 or 28A authorises an officer to produce or take possession of, or make copies of or take extracts from, anything which, by virtue of subsection (1), a person could not be required to produce or disclose under this Part.*

*(2) “Privileged communication” means a communication —*

*(a) between a professional legal adviser and his client; or*

*(b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings;*

*which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege”*

On this basis, in the normal course of events, the CMA will not be entitled to inspect (or during a dawn raid, view or take possession of,) documents which are covered by legal advice privilege or litigation privilege (legal professional privilege).

**‘Privilege’ and CMA investigations**

A connected, important question, is whether documents created for the purposes of a competition investigation are covered by litigation privilege in the context of any (connected) court proceedings. In other words, what constitutes ‘litigation’ for the purposes of ‘litigation privilege’? Is a CMA investigation litigation such that documents produced in relation to an investigation can attract litigation privilege in court proceedings?

The case on the next page may aid your understanding.

**Tesco v OFT**

In Tesco Stores Limited and others v Office of Fair Trading [2012] CAT 6, the Competition Appeal Tribunal (the ‘**CAT**’) dismissed an application by the OFT (the predecessor of the CMA) for disclosure and inspection of certain documents and information prepared by Tesco in relation to an OFT investigation. The CAT found that the requirements for litigation privilege had been satisfied - communications between Tesco’s solicitors and a third party were covered by litigation privilege. In particular, the CAT held that once the OFT had issued a Statement of Objections, the nature of the OFT investigation was ‘adversarial’, as opposed to ‘inquisitorial’. On this basis, the key elements of the test for litigation privilege had been satisfied.

**Strategic Market Status**

The Digital Markets, Competition and Consumers Act 2024 established a new regime which allows the CMA to regulate the conduct and activities of powerful tech companies.

From 1 January 2025, the CMA has the power to designate any firm as having “Strategic Market Status” (“SMS”) in respect of digital activity in the UK if it meets certain thresholds. The CMA will consider the firm’s global/UK turnover, and whether it holds “*substantial and entrenched market power*” and a “*position of strategic significance*” in relation to digital activity in the UK.

In practice SMS is likely to apply to only a handful of the largest tech companies and will be established following individual CMA investigations into the firm.

Once subject to SMS status, the CMA can subject the firm to certain additional obligations and responsibilities including:

• **Enhanced merger control:** SMS firms must report any acquisitions exceeding £25 million and planned joint ventures prior to closing where the target is in the UK;

• **Tailored conduct requirements**: bespoke rules set by the CMA to guide the firm’s practices in relation to digital activity, based on principles such as fair trading, trust and transparency; and

• **Pro-competition investigations/orders:** the CMA can investigate SMS firms to assess whether relevant digital activity is having an adverse effect on competition and impose an intervention, e.g. structural (e.g. an order mandating the separation of businesses) or behavioural (e.g. an order that the firm must provide wider access to its technology or data access).

Failure to comply with the requirements set can result in a fine of up to 10% global turnover and daily penalties of 5% daily global turnover for each day the breach continues. The CMA can also use its powers under CA1998 as set out above to investigate SMS firms suspected of competition law infringements.

**Summary of procedure**

[diagram showing the following steps:

- Prioritisation principles: should matter be taken forward?

- If CMA decides to pursue the matter: Initial Assessment Phase (use of informal information gathering powers)

- Formal investigation? Use of formal investigation gathering powers / potentially comments from 3rd parties

- Analysis and review

- Letter from CMA setting out provisional findings, Statement of Objections, supporting evidence and proposed action. Company gains right to access the investigation file. Provision by the company of binding “commitments on future conduct” may preclude the need for an infringement decision being handed down. Settlement discussions may also take place at this stage.

- Right to reply (in writing and, if requested by the company, at a meeting). Settlement discussions may also take place at this stage.

- Oral hearing? Settlement discussions may also take place at this stage.

- CMA issues and publishes final decision (including directions). This could lead to one or more of three things:

Court order enforcing directions?

Competition Appeal Tribunal (“CAT”) (Appeal to Court of Appeal on a point of law)

Judicial review (for matters falling outside the CAT’s jurisdiction)

**Summary**

- Broadly, the CMA can (but not necessarily will) investigate if there are reasonable grounds for suspecting a competition law infringement.

- The CMA has both informal and formal investigation powers.

- It has powers to require production of specified documents, conduct interviews, enter premises without a warrant and search premises with a warrant.

- The CMA cannot require production / disclosure of a document which would be protected from disclosure in High Court proceedings on the grounds of legal advice privilege or litigation privilege.

- A CMA investigation, once it has reached the ‘Statement of Objections’ stage, is likely to be adversarial such that documents in relation to that investigation may attract litigation privilege in related court proceedings.

- Intentionally obstructing an investigation can attract criminal sanctions and fines.

- The CMA has enhanced powers under the Digital Markets, Competition and Consumers Act 2024 to regulate and investigate powerful tech companies.